REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 880 OF 2017

ASSOCIATION FOR DEMOCRATIC REFORMS AND ANOTHER ..... APPELLANTS

VERSUS

UNION OF INDIA AND OTHERS ..... RESPONDENTS

W I T H

WRIT PETITION (CIVIL) NO. 59 OF 2018

WRIT PETITION (CIVIL) NO. 975 OF 2022

A N D

WRIT PETITION (CIVIL) NO. 1132 OF 2022

J U D G M E N T

SANJIV KHANNA, J.

I have had the benefit of perusing the judgment authored by Dr. D.Y. Chandrachud, the Hon'ble Chief Justice. I respectfully agree with the findings and conclusions recorded therein. However, since my reasoning is different to arrive at the same conclusion,

including application of the doctrine of proportionality, I am penning down my separate opinion.

2. To avoid prolixity, the contentions of the parties are not referred to separately and the facts are narrated in brief.

3. Corporate funding of political parties has been a contentious issue with the legislature's approach varying from time to time. The amendments to the Companies Act, 1956 reveal the spectrum of views of the legislature. It began with regulations and restrictions in 1960[1] to a complete ban on contributions to political parties in 1969[2]. The ban was partially lifted in 1985 with restrictions and stipulations.[3] The aggregate amount contributed to a political party in a financial year could not exceed 5% of the average net profit during the three immediately preceding financial years.[4] A new condition stipulated that the board of directors[5] in their meeting would pass a resolution giving legitimacy and authorisation to contributions to a political party.[6]

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[1] The Companies (Amendment) Act 1960, s 100 inserted into the Companies Act 1956, s 293A which stipulates that contributions to political parties cannot exceed 5% of the average net profit of the company during the three immediately preceding financial years.
[2] The Companies (Amendment) Act 1969, s 3 substituted of the Companies Act 1956, s 293A introducing a ban on contributions to political parties.
[3] The Companies (Amendment) Act 1985, s 2 replaced of the Companies Act 1956, s 293A bringing back the 5% cap on contributions to political parties.
[4] The Companies Act 1956, s 293A.
[5] For short, the "Board".
[6] Second *proviso* to Section 293A(2), Companies Act, 1956.

4. The Companies Act of 2013 replaced the Companies Act of 1956. Section 182(1) of the Companies Act, 2013[7] permitted contributions by companies of any amount to any political party, if the said company had been in existence for more than three immediately preceding financial years and is not a government company. The requirement of authorisation *vide* Board resolution is retained.[8] The cap of 5% is enhanced to 7.5% of the average net profits during the three immediately preceding financial years.[9] It is also mandated that the company must disclose the amount contributed by it to political parties in the profit and loss account, including particulars of name of political party and the amount contributed.[10] In case of violation of the terms, penalties stand prescribed.

5. The Finance Act, 2017 made several amendments to the Companies Act, 2013, Income Tax Act, 1961, Reserve Bank of India[11] Act, 1934, the Representation of the People Act, 1951, and the Foreign Contribution Regulation Act, 2010. These changes were brought in to allow contributions/donations through Electoral Bonds[12]. The changes made by the Finance Act, 2017 to these

[7] As originally enacted.
[8] Unamended second *proviso* to Section 182(1) of the Companies Act, 2013. This condition continues to remain.
[9] Unamended first *proviso* to Section 182(1) of the Companies Act, 2013.
[10] Unamended Section 182(3) of the Companies Act, 2013.
[11] For short, "RBI".
[12] For short, "Bonds".

legislations were provided in a tabular format by the petitioners. For clarity, I have reproduced the table below. The specific changes are highlighted in bold and italics for ease of reference:

Section 182 of the Companies Act, 2013	
Prior to Amendment by the Finance Act, 2017	*Post Amendment by Section 154 of the Finance Act, 2017*
182. Prohibitions and restrictions regarding political contributions- (1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party: ***Provided that the amount referred to in sub-section (1) or, as the case may be, the aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years:*** Provided further that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making and the acceptance of the contribution authorised by it.	182. Prohibitions and restrictions regarding political contributions- (1) Notwithstanding anything contained in any other provision of this Act, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party: ***[First proviso omitted]*** Provided that no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.
182 (3) Every company shall disclose in its profit and loss account ***any amount or amounts*** contributed by it to any political party during the financial year to which that account relates, ***giving particulars of the total amount contributed and the name of the party to which such amount has been*** contributed***.***	182 (3) Every company shall disclose in its profit and loss account ***the total amount*** contributed by it under this section during the financial year to which the account relates. ***(3A) Notwithstanding anything contained in sub-section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of***

	electronic clearing system through a bank account: ***Provided that a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.***

Section 13-A of the Income Tax Act, 1961	
Prior to Amendment by the Finance Act, 2017	*Post Amendment by Section 11 of the Finance Act, 2017*
13-A. Special provision relating to incomes of political parties.— Any income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or "*capital gains or*" any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party: Provided that— (*a*) such political party keeps and maintains such books of account and other documents as would enable the Assessing Officer to properly deduce its income therefrom; (*b*) in respect of each such voluntary contribution in excess of twenty thousand rupees, such political party keeps and maintains a record of such contribution and the name and address of the person who has made such contribution; and (*c*) the accounts of such political party are audited by an accountant as defined in the Explanation below sub-section (2) of Section 288: Provided further that if the Treasurer of such political party or any other person authorised by that political party in this behalf fails to submit a report under sub-section (3) of Section 29-C of the Representation of the People Act, 1951 (43 of 1951) for a financial year, no exemption under this section shall be available for that political party for such financial year.	13-A. Special provision relating to incomes of political parties.— Any income of a political party which is chargeable under the head "Income from house property" or "Income from other sources" or "*capital gains or*" any income by way of voluntary contributions received by a political party from any person shall not be included in the total income of the previous year of such political party: Provided that— (*a*) such political party keeps and maintains such books of account and other documents as would enable the Assessing Officer to properly deduce its income therefrom; (*b*) in respect of each such voluntary contribution ***other than contribution by way of electoral bond*** in excess of twenty thousand rupees, such political party keeps and maintains a record of such contribution and the name and address of the person who has made such contribution; (*c*) the accounts of such political party are audited by an accountant as defined in the Explanation below sub-section (2) of Section 288 and: ***(d)*** **no donation exceeding two *thousand* rupees is received by such political party otherwise than by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account or through electoral bond.**

Explanation.—For the purposes of this section, "political party" means a political party registered under Section 29-A of the Representation of the People Act, 1951 (43 of 1951).	*Explanation*.— For the purposes of this proviso, **"electoral bond" means a bond referred to in the *Explanation* to sub-section (3) of Section 31 of the Reserve Bank of India Act, 1934 (2 of 1934).** Provided further that if the Treasurer of such political party or any other person authorised by that political party in this behalf fails to submit a report under sub-section (3) of Section 29-C of the Representation of the People Act, 1951 (43 of 1951) for a financial year, no exemption under this section shall be available for that political party for such financial year. Provided also that such political party furnishes a return of income for the previous year in accordance with the provisions of sub-section (*4B*) of Section 139 on or before the due date under that section. *Explanation.*—For the purposes of this section, "political party" means a political party registered under Section 29-A of the Representation of the People Act, 1951 (43 of 1951).

Section 31 of the Reserve Bank of India Act, 1934	
Prior to Amendment by the Finance Act 2017	*Post Amendment by Section 135 of the Finance Act 2017*
Section 31. Issue of demand bills and notes.— (1) No person in India other than the Bank, or, as expressly authorized by this Act the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person: Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent. (2) Notwithstanding anything contained in the Negotiable Instruments Act, 1881	Section 31. Issue of demand bills and notes.— (1) No person in India other than the Bank, or, as expressly authorized by this Act the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand, or borrow, owe or take up any sum or sums of money on the bills, hundis or notes payable to bearer on demand of any such person: Provided that cheques or drafts, including hundis, payable to bearer on demand or otherwise may be drawn on a person's account with a banker, shroff or agent. 2) Notwithstanding anything contained in the Negotiable Instruments Act, 1881 (26 of 1881), no person in India other than the Bank or, as expressly authorised by this

(26 of 1881), no person in India other than the Bank or, as expressly authorised by this Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer of the instrument.	Act, the Central Government shall make or issue any promissory note expressed to be payable to the bearer of the instrument. ***(3) Notwithstanding anything contained in this section, the Central Government may authorise any scheduled bank to issue electoral bond.*** ***Explanation.— For the purposes of this sub-section, "electroal bond" means a bond issued by any scheduled bank under the scheme as may be notified by the Central Government.***

Section 29-C of the Representation of the People Act 1951	
Prior to Amendment by the Finance Act 2017	*Post Amendment by Section 137 of the Finance Act 2017*
29-C. Declaration of donation received by the political parties.— (1) The treasurer of the political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely:— (*a*) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year; (*b*) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year. (2) The report under sub-section (1) shall be in such form as may be prescribed. (3) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other person authorised by the political party in this behalf before the due date for furnishing a return of its income of that financial year under Section 139 of the Income Tax, 1961 (43 of 1961) to the Election Commission. (4) Where the treasurer of any political party or any other person authorised by the political party in this behalf fails to submit a report under sub-section (3),	29-C. Declaration of donation received by the political parties.— (1) The treasurer of the political party or any other person authorised by the political party in this behalf shall, in each financial year, prepare a report in respect of the following, namely:— (*a*) the contribution in excess of twenty thousand rupees received by such political party from any person in that financial year; (*b*) the contribution in excess of twenty thousand rupees received by such political party from companies other than Government companies in that financial year. ***Provided that nothing contained in this sub-section shall apply to the contributions received by way of an electoral bond.*** ***Explanation.— For the purposes of this sub-section, "electoral bond" means a bond referred to in the Explanation to sub-section (3) of Section 31 of the Reserve Bank of India Act, 1934 (2 of 1934).*** (2) The report under sub-section (1) shall be in such form as may be prescribed. (3) The report for a financial year under sub-section (1) shall be submitted by the treasurer of a political party or any other

then, notwithstanding anything contained in the Income Tax Act, 1961 (43 of 1961), such political party shall not be entitled to any tax relief under that Act.	person authorised by the political party in this behalf before the due date for furnishing a return of its income of that financial year under Section 139 of the Income Tax, 1961 (43 of 1961) to the Election Commission. (4) Where the treasurer of any political party or any other person authorised by the political party in this behalf fails to submit a report under sub-section (3), then, notwithstanding anything contained in the Income Tax Act, 1961 (43 of 1961), such political party shall not be entitled to any tax relief under that Act.

Section 2 of the Foreign Contribution Regulation Act, 2010	
Prior to Amendment by the Finance Act 2017	*Post Amendment by Section 236 the Finance Act 2017*
Section 2 (1) (j) (*j*) "foreign source" includes,— (*i*) the Government of any foreign country or territory and any agency of such Government; (*ii*) any international agency, not being the United Nations or any of its specialised agencies, the World Bank, International Monetary Fund or such other agency as the Central Government may, by notification, specify in this behalf; (*iii*) a foreign company; (*iv*) a corporation, not being a foreign company, incorporated in a foreign country or territory; (*v*) a multi-national corporation referred to in sub-clause (*iv*) of clause (*g*); (*vi*) a company within the meaning of the Companies Act, 1956 (1 of 1956), and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely— (A) the Government of a foreign country or territory; (B) the citizens of a foreign country or territory; (C) corporations incorporated in a foreign country or territory; (D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;	Section 2 (1) (j) (*j*) "foreign source" includes,— (*i*) the Government of any foreign country or territory and any agency of such Government; (*ii*) any international agency, not being the United Nations or any of its specialised agencies, the World Bank, International Monetary Fund or such other agency as the Central Government may, by notification, specify in this behalf; (*iii*) a foreign company; (*iv*) a corporation, not being a foreign company, incorporated in a foreign country or territory; (*v*) a multi-national corporation referred to in sub-clause (*iv*) of clause (*g*); (*vi*) a company within the meaning of the Companies Act, 1956 (1 of 1956), and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely— (A) the Government of a foreign country or territory; (B) the citizens of a foreign country or territory; (C) corporations incorporated in a foreign country or territory; (D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory; (E) foreign company;

(E) foreign company;	***Provided that where the nominal value of share capital is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999 (42 of 1999), or the rules or regulations made thereunder, then, notwithstanding the nominal value of share capital of a company being more than one-half of such value at the time of making the contribution, such company shall not be a foreign source.***

6. The amended Companies Act, 2013 removes the cap on corporate funding.[13] The requirement that the contribution will require a resolution passed at the meeting of the Board is retained. In the profit and loss account, a company is now only required to disclose the total amount contributed to political parties in a financial year.[14] The requirement to disclose the specific amounts contributed and the names of the political parties is omitted. Section 182(3A), as introduced, stipulates that the company could contribute to a political party only by way of a cheque, Electronic Clearing System[15], or demand draft.[16] The *proviso* to Section 182(3A) permits a company to contribute through any instrument issued pursuant to any scheme notified under the law, for the time being in force, for contribution to political parties.

[13] First *proviso* to Section 182(1), Companies Act, 2013 has been omitted *vide* the Finance Act, 2017.
[14] Section 182(3) of the Companies Act, 2013.
[15] For short, "ECS".
[16] Section 182(3A) of the Companies Act, 2013 was introduced *vide* Section 154 of the Finance Act, 2017.

7. Section 13A of the Income Tax Act, 1961,[17] exempts income of political parties, including financial contributions and investments, from income tax. The object of providing a tax exemption is to increase the funds of political parties from legitimate sources. However, conditions imposed require political parties to maintain books of accounts and other documents to enable the assessing officer to properly deduce their income.[18] Political parties are required to maintain records of the name and addresses of persons who make voluntary contributions in excess of Rs.20,000/-.[19] Accounts of the political parties are required to be audited.[20]

8. In 2003, Section 80GGB and 80GGC were inserted in the Income Tax Act, 1961, permitting contributions to political parties. These contributions are tax deductible, though they are not expenditure for purposes of business, to incentivise contributions through banking channels.[21]

9. By the Finance Act, 2017, Section 13A of the Income Tax Act, 1961, was amended. Section 13A now stipulates that a political party is not required to maintain a record of the contributions received by

[17] As amended in 1978.
[18] First *proviso* 1(a) to the unamended Section 13A of the Income Tax Act, 1961.
[19] Second *proviso* to the unamended Section 13A of the Income Tax Act, 1961.
[20] Third *proviso* to Section 13A Income Tax Act, 1961.
[21] See Section 37 of the Income Tax Act, 1961.

Bonds.[22] Further, donations over Rs.2,000/- are only permitted through cheques, bank drafts, ECS or Bonds.[23]

10. Section 29C of the Representation of the People Act, 1951 was introduced in 2003.[24] The section requires each political party to file a report for all contributions over Rs.20,000/- to the Election Commission of India.[25] The report is required to be filed before the due date of filing income tax returns of the financial year under the Income Tax Act, 1961. Failure to submit a report disentitles a political party from any tax relief, as provided under the Income Tax Act, 1961. Section 29C of the Finance Act, 2017, as amended, stipulates that political parties are not required to disclose the details of contributions received by Bonds.[26]

11. Section 31(3) of the RBI Act, 1934 was added by the Finance Act, 2017 to effectuate the issuance of the Bonds which, as envisaged, are not to mention the name of the political party to whom they are payable, and hence are in the nature of bearer demand bill or note.

12. On 02.01.2018, the Department of Economic Affairs, Ministry of Finance, notified the Electoral Bonds Scheme, 2018[27] in terms of

[22] Second *proviso* to Section 13A of the Income Tax Act, 1961.
[23] Fourth *proviso* to Section 13A of the Income Tax Act, 1961.
[24] Introduced *vide* Section 2, Election and Other Related Laws (Amendment) Act, 2003.
[25] For short, "ECI".
[26] *Proviso* to Section 29C(1) of the Representation of the People Act, 1951.
[27] For short, "the Scheme".

Section 31(3) of the RBI Act, 1934.[28] The salient features of this Scheme are:

⇒ Bonds are in the nature of a promissory note and bearer instrument.[29] They do not carry the name of the buyer or payee.[30]

⇒ Bonds can be purchased by any 'person'[31] who is a citizen of India or who is a body corporate incorporated or established in India.[32] Any 'person' who is an individual can purchase Bonds either singly or jointly with other individuals.[33]

⇒ Bonds are to be issued in denominations of Rs.1,000/-, Rs.10,000/-, Rs.1,00,000/-, Rs.10,00,000/- and Rs.1,00,00,000/-.[34] They are valid for a period of 15 days from the date of issue.[35] The amount of Bonds not encashed within the validity period of 15 days, would be deposited by the authorised bank to the Prime Minister Relief Fund.[36]

⇒ The Bond is non-refundable.[37]

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[28] Finance Act, 2017 has also amended and added Section 31(3) to the RBI Act, 1934 as the Bonds in question are bearer bonds like Indian currency. However, we do not think this amendment is required to be separately adjudicated as it merely effectuates the Bonds scheme.
[29] Paragraph 2(a) of the Scheme.
[30] *Ibid.*
[31] Paragraph 2(d) of the Scheme defines a 'person' to include an individual, Hindu undivided family, company, firm, an association of persons or body of individuals, whether incorporated or not. It also includes every artificial judicial person and any agency, office or branch owned by such 'person'.
[32] Paragraph 3(1) of the Scheme.
[33] Paragraph 3(2) of the Scheme.
[34] Paragraph 5 of the Scheme.
[35] Paragraph 6 of the Scheme.
[36] Paragraph 12(2) of the Scheme.
[37] Paragraph 7(6) of the Scheme.

⇒ A 'person' who wishes to purchase a Bond is required to apply in the specified format.[38] Non-compliant applications are to be rejected.

⇒ To purchase Bonds, a buyer is required to apply to the authorised bank.[39] RBI's Know Your Customer[40] requirements apply and the authorised bank could ask for additional KYC documents, if necessary.[41]

⇒ The payments for the issuance of Bonds are required to be made in Indian rupees through demand draft, cheque, ECS or direct debit to the buyer's account.[42]

⇒ The identity and information furnished by the buyer for the issuance of Bonds is to be treated as confidential by the authorised issuing bank.[43] The details, including identity, can be disclosed only when demanded by a competent court or on registration of any criminal case by any law enforcement agency.[44]

⇒ Only eligible political parties, meaning a party that is registered under Section 29A of the Representation of the People Act,

[38] Paragraph 7 of the Scheme.
[39] Paragraph 2(b) of the Scheme defines an authorized bank as the State Bank of India and its specified branches.
[40] For short, "KYC".
[41] Paragraph 4 of the Scheme.
[42] Paragraph 11 of the Scheme.
[43] Paragraph 7(4) of the Scheme.
[44] *Ibid.*

1951, and has secured not less than 1% of the votes polled in the last general election to the House of People or the Legislative Assembly, can receive a Bond.[45]

⇒ The eligible political party can encash the Bond through their bank account in the authorised bank.[46]

⇒ The Bonds are made available for purchase for a period of 10 days every quarter, in the months of January, April, July and October, as may be specified by the Central Government.[47] They are also made available for an additional period of 30 days, as specified by the central government in a year where general elections to the House of People are held.[48]

⇒ The Bonds are not eligible for trading,[49] and commission, brokerage or other charges are not chargeable/payable for issuance of a Bond.[50]

⇒ The value of the Bond is considered as income by way of voluntary contributions to eligible political parties for the purposes of tax exemption under Section 13A of the Income Tax Act, 1961.[51]

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[45] Paragraph 3(3) of the Scheme.
[46] Paragraph 3(4) of the Scheme.
[47] Paragraph 8(1) of the Scheme.
[48] Paragraph 8(2) of the Scheme.
[49] Paragraph 14 of the Scheme.
[50] Paragraph 12 of the Scheme.
[51] Paragraph 13 of the Scheme.

13. In the afore-mentioned writ petitions filed under Article 32 of the Constitution of India,[52] the petitioners are seeking a declaration that the Scheme and the relevant amendments made by the Finance Act, 2017, are unconstitutional.

14. The question of the constitutional validity of the Scheme and the amendments introduced by the Finance Act, 2017 are being examined by us. The question of introducing these amendments through a money bill under Article 110 of the Constitution is not being examined by us.[53] The scope of Article 110 of the Constitution has been referred to a seven-judge Bench and is *sub-judice*.[54] Further, a batch of petitions challenging the amendments to the Foreign Contribution Regulation Act, 2010 by the Finance Acts of 2016 and 2018 are pending. The challenge to the said amendments is not being decided by us.

15. I fully agree with the Hon'ble Chief Justice, that the Scheme cannot be tested on the parameters applicable to economic policy. Matters of economic policy normally pertain to trade, business and commerce, whereas contributions to political parties relate to the democratic polity, citizens' right to know and accountability in our

[52] For short, "the Constitution".
[53] The Finance Act, 2017 was introduced and passed as a money bill by the Parliament under Article 110 of the Constitution.
[54] *Rojer Matthew* v. *South Indian Bank Ltd. and Ors.*, Civil Appeal No. 8588 of 2019.

democracy. The primary objective of the Scheme, and relevant amendments introduced by the Finance Act, 2017, is electoral reform and not economic reform. Thus, the dictum and the principles enunciated by this Court in ***Swiss Ribbons (P.) Ltd. and Another*** v. ***Union of India and Others***,[55] and ***Pioneer Urban Land and Infrastructure and Another*** v. ***Union of India and Others***,[56] relating to judicial review on economic policy matters have no application to the present case. To give the legislation the latitude of economic policy, we will be diluting the principle of free and fair elections. Clearly, the importance of the issue and the nexus between money and electoral democracy requires us to undertake an in-depth review, albeit under the settled powers of judicial review.

16. Even otherwise, it is wrong to state as a principle that judicial review cannot be exercised over every matter pertaining to economic policy.[57] The law is that the legislature has to be given latitude in matters of economic policy as they involve complex financial issues.[58] The degree of deference to be shown by the court while

[55] (2019) 4 SCC 17.
[56] (2019) 8 SCC 416.
[57] *R.K. Garg* v. *Union of India and Others*, (1981) 4 SCC 675.
[58] *Ibid*. See also *Bhavesh D. Parish and Others* v. *Union of India and Others*, (2000) 5 SCC 471, and *Directorate General of Foreign Trade and Others* v. *Kanak Exports and Another*, (2016) 2 SCC 226.

exercising the power of judicial review cannot be put in a straitjacket.

17. On the question of burden of proof, I respectfully agree with the observations made by the Hon'ble Chief Justice, that once the petitioners are able to *prima facie* establish a breach of a fundamental right, then the onus is on the State to show that the right limiting measure pursues a proper purpose, has rational nexus with that purpose, the means adopted were necessary for achieving that purpose, and lastly proper balance has been incorporated.

18. The doctrine of presumption of constitutionality has its limitations when we apply the test of proportionality. In a way the structured proportionality places an obligation on the State at a higher level, as it is a polycentric examination, both empirical and normative. While the courts do not pass a value judgment on contested questions of policy, and give weight and deference to the government decision by acknowledging the legislature's expertise to determine complex factual issues, the proportionality test is not based on preconceived notion or presumption. The standard of proof is a civil standard or a balance of probabilities;[59] where scientific or social science evidence is available, it is examined; and

[59] *R*. v. *Oakes*, (1986) 1 S.C.R. 103.

where such evidence is inconclusive or does not exist and cannot be developed, reason and logic may suffice.[60]

19. The right to vote is a constitutional and statutory right,[61] grounded in Article 19(1)(a) of the Constitution, as the casting of a vote amounts to expression of an opinion by the voter.[62] The citizens' right to know stems from this very right, as meaningfully exercising choice by voting requires information. Representatives elected as a result of the votes cast in their favour, enact new, and amend existing laws, and when in power, take policy decisions. Access to information which can materially shape the citizens' choice is necessary for them to have a say in how their lives are affected. Thus, the right to know is paramount for free and fair elections and democracy.

20. The decisions in ***Association for Democratic Reforms*** (supra) and ***People's Union of Civil Liberties (PUCL)*** (supra) should not be read as restricting the right to know the antecedents of a candidate contesting the elections.[63] The political parties select

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[60] See *Libman* v. *Quebec (A.G.)*, [1997] 3 S.C.R. 569; *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Thomson Newspapers Co.* v. *Canada (A.G.)*, [1998] 1 S.C.R. 877; *R.* v. *Sharpe*, [2001] 1 S.C.R. 45; *Harper* v. *Canada (A.G.)*, [2004] 1 S.C.R. 827, at paragraph 77; *R.* v. *Bryan*, [2007] 1 S.C.R. 527, at paragraphs 16-19, 29; *Mounted Police Association of Ontario* v. *Canada (Attorney General)*, [2015] 1 S.C.R. 3, at paragraphs 143-144.

[61] Article 326, Constitution.

[62] *Union of India v. Association for Democratic Reforms and Another*, (2002) 5 SCC 294, and *People's Union of Civil Liberties (PUCL) and Another v. Union of India and Another*, (2003) 4 SCC 399.

[58] *Ibid*.

candidates who contest elections on the symbol allotted to the respective political parties[64]. Upon nomination, the candidates enjoy the patronage of the political parties, and are financed by them. The voters elect a candidate with the objective that the candidate's political party will come to power and fulfil the promises.

21. The Hon'ble Chief Justice has referred to the Tenth Schedule of the Constitution. The Schedule incorporates a provision for the disqualification of candidates on the ground of defection, which reflects the importance of political parties in our democracy. Section 77 of the Representation of the People Act, 1951, requires monetary limits to be prescribed for expenditures incurred by candidates.[65] As political parties are at the helm of the electoral process, including its finances, the argument that the right of the voter does not extend to knowing the funding of political parties and is restricted to antecedents of candidates, will lead to an incongruity. I, respectfully, agree with Hon'ble the Chief Justice, that denying voters the right to know the details of funding of political parties would lead to a dichotomous situation. The funding of

[64] The Representation of the People Act, 1951 permits candidates not set up by a recognized political party, that is independent candidates, to contest elections as well.
[65] Under Explanation 1 to Section 77 of the Representation of the People Act, 1951, the expenditure incurred by 'leaders of political parties' on account of travel for propagating the programme of the political party, is not deemed to be election expenditure.

political parties cannot be treated differently from that of the candidates who contest elections.[66]

22. Democratic legitimacy is drawn not only from representative democracy but also through the maintenance of an efficient participatory democracy. In the absence of fair and effective participation of all stakeholders, the notion of representation in a democracy would be rendered hollow. In a democratic set-up, public participation is meant to fulfil three functions; the epistemic function of ensuring reasonably sound decisions,[67] the ethical function of advancing mutual respect among citizens, and the democratic function of promoting "an inclusive process of collective choice".[68] James Fishkin lists five criteria which define the quality of a deliberative process.[69] These are:

- Information (the extent to which participants are given access to accurate and reliable information);

[66] See observations of this court in *Kanwar Lal Gupta* v. *Amar Nath Chawla & Ors.*, (1975) 3 SCC 646.
[67] This function is elaborated as to "produce preferences, opinions, and decisions that are appropriately informed by facts and logic and are the outcome of substantive and meaningful consideration of relevant reasons(...). Because the topics of these deliberations are issues of common concern, epistemically well-grounded preferences, opinions, and decisions must be informed by, and take into consideration, the preferences and opinions of fellow citizens", Jane Mansbridge and others, 'A Systemic Approach to Deliberative Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems* (1st edn, Cambridge University Press 2012) 11.
[68] *Ibid* at 12.
[69] James S Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (Oxford University Press 2011) 33– 34.

- Substantive balance (the extent to which arguments offered by one side are answered by considerations offered by those who hold other perspectives);
- Diversity (the extent to which major positions in the public are represented by participants);
- Conscientiousness, (the degree to which participants sincerely weigh the merits of the arguments); and
- Equal consideration (the extent to which arguments offered by all participants are considered on its merits regardless of who offered them).[70]

23. The State has contested the writ petitions primarily on three grounds:

(i) Donors of a political party often apprehend retribution from other political parties or actors and thus their identities should remain anonymous. The Bonds uphold the right to privacy of donors by providing confidentiality. Further, donating money to one's preferred political party is a matter of self-expression by the donor. Therefore, revealing the identity invades the informational privacy of donors protected by the Constitution.[71] The identity of the donor can be revealed in

[70] This is equally important from the perspective of the test of proportionality.
[71] See *K.S. Puttaswamy and Anr.* v. *Union of India and Ors. (9J) (Privacy)*, (2017) 10 SCC 1.

exceptional cases, for instance on directions of a competent court, or registration of a criminal case by any law enforcement agency.[72]

(ii) The Scheme, by incentivising banking channels and providing confidentiality, checks the use of black or unaccounted money in political contributions.[73]

(iii) The Scheme is an improvement to the prior legal framework. It has inbuilt safeguards such as compliance of donors with KYC norms, bearer bonds having a limited validity of fifteen days and recipients belonging to a recognised political party that has secured more than 1% votes in the last general elections.

24. Hon'ble the Chief Justice has rejected the Union of India's submissions by applying the doctrine of proportionality. This is a principle applied by courts when they exercise their power of judicial review in cases involving a restriction on fundamental rights. It is applied to strike an appropriate balance between the fundamental right and the pursued purpose and objective of the restriction.

[72] Paragraph 7(4) of the Scheme.
[73] See Arun Jaitley, 'Why Electoral Bonds Are Necessary', Press Information Bureau, 2018.

25. The test of proportionality comprises four steps:[74]

(i) The first step is to examine whether the act/measure restricting the fundamental right has a legitimate aim (legitimate aim/purpose).

(ii) The second step is to examine whether the restriction has rational connection with the aim (rational connection).

(iii) The third step is to examine whether there should have been a less restrictive alternate measure that is equally effective (minimal impairment/necessity test).

(iv) The last stage is to strike an appropriate balance between the fundamental right and the pursued public purpose (balancing act).

26. In ***Modern Dental College & Research Centre and Others*** v. ***State of Madhya Pradesh and Others***,[75] this Court had applied proportionality in its four-part doctrinal form[76] as a standard for reviewing right limitations in India. This test was modified in ***K.S. Puttaswamy (Retired) and Anr. (Aadhar)*** v. ***Union of India and Anr. (5J)***,[77] where this Court adopted a more tempered and

[74] See Aharon Barak, "Proportionality – Constitutional Rights and their Limitations", Cambridge University Press, 2012.
[75] (2016) 7 SCC 353.
[76] In *Gujarat Mazdoor Sabha and Another v. State of Gujarat*, (2020) 10 SCC 459, the Court added fifth prong to proportionality test. It stipulated that the state should provide sufficient safeguards against the abuse of such restriction. This was relied upon in *Ramesh Chandra Sharma and Others v. State of U.P. and Others*, 2023 SCC OnLine SC 162.
[77] (2019) 1 SCC 1.

nuanced approach.[78] The Court, *inter alia*, imposed a stricter test for the third and fourth prongs, namely necessity and balancing stages of the test of proportionality, as reproduced below.

> "155. ...In order to preserve a meaningful but not unduly strict role for the necessity stage, Bilchitz proposes the following inquiry. First, a range of possible alternatives to the measure employed by the Government must be identified. Secondly, the effectiveness of these measures must be determined individually; the test here is not whether each respective measure realises the governmental objective to the same extent, but rather whether it realises it in a "real and substantial manner". Thirdly, the impact of the respective measures on the right at stake must be determined. Finally, an overall judgment must be made as to whether in light of the findings of the previous steps, there exists an alternative which is preferable; and this judgment will go beyond the strict means-ends assessment favoured by Grimm and the German version of the proportionality test; it will also require a form of balancing to be carried out at the necessity stage.
>
> 156. Insofar as second problem in German test is concerned, it can be taken care of by avoiding "ad hoc balancing" and instead proceeding on some "bright-line rules" i.e. by doing the act of balancing on the basis of some established rule or by creating a sound rule...
>
> xx xx xx
>
> 158. ...This Court, in its earlier judgments, applied German approach while applying proportionality test to the case at hand. We would like to proceed on that very basis which, however, is tempered with more nuanced approach as suggested by Bilchitz. This, in fact, is the amalgam of German and Canadian approach. We feel that the stages, as mentioned in Modern Dental College & Research Centre and recapitulated above, would be the safe method in undertaking this exercise, with focus

[78] See David Bilchitz, "Necessity and Proportionality: Towards a Balance Approach?", (Hart Publishing, Oxford and Portland, Oregon 2016). Also see Aparna Chandra, "Proportionality: A Bridge to Nowhere?", (Oxford Human Rights Journal 2020).

> on the parameters as suggested by Bilchitz, as this projects an ideal approach that need to be adopted."

27. The said test was also referred to in ***Anuradha Bhasin*** v. ***Union of India and Others***,[79] with the observation that the principle of proportionality is inherently embedded in the Constitution under the doctrine of reasonable restriction. This means that limitations imposed on a right should not be arbitrary or of excessive nature beyond what is required in the interest of public. This judgment thereupon references works of scholars/jurists who have argued that if the necessity prong of the proportionality test is applied strictly, legislations and policies, no matter how well intended, would fail the proportionality test even if any other slightly less drastic measure exists.[80] Thereupon, the Court accepted the suggestion in favour of a moderate interpretation of the necessity test. Necessity involves a process of reasoning designed to ensure that only measures with a strong relationship to the objective they seek to achieve can justify an invasion of fundamental rights. The process thus requires a court to reason through the various stages of moderate interpretation of necessity in the following manner:

> "(MN1) All feasible alternatives need to be identified, with courts being explicit as to criteria of feasibility;

[79] (2020) 3 SCC 637.
[80] *Anuradha Bhasin* (supra) at paragraph 71.

(MN2) The relationship between the government measure under consideration, the alternatives identified in MN1 and the objective sought to be achieved must be determined. An attempt must be made to retain only those alternatives to the measure that realise the objective in a real and substantial manner;

(MN3) The differing impact of the measure and the alternatives (identified in MN2) upon fundamental rights must be determined, with it being recognised that this requires a recognition of approximate impact; and

(MN4) Given the findings in MN2 and MN3, an overall comparison (and balancing exercise) must be undertaken between the measure and the alternatives. A judgment must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights ("the comparative component").

28. Dr. Justice D.Y. Chandrachud, as his Lordship then was, in ***K.S. Puttaswamy (5J)(Aadhar)***(supra), had observed that the objective of the second prong of rational connection test is essential to the test of proportionality.[81] Sanjay Kishan Kaul, J. in his concurring opinion in ***K.S. Puttaswamy (9J) (Privacy)*** (supra) had held that actions not only should be sanctioned by law, but the proposed actions must be necessary in a democratic society for a legitimate aim. The extent of interference must be proportionate to the need for such interference and there must be procedural guarantees against abuse of such interference.

[81] Dr. Justice D.Y. Chandrachud was in minority in *K.S. Puttaswamy (Aadhaar)* (supra), albeit his observations on the objective of the second prong of rational connection are good and in consonance with the law on the subject.

29. The test of proportionality is now widely recognised and employed by courts in various jurisdictions like Germany, Canada, South Africa, Australia and the United Kingdom.[82] However, there isn't uniformity in how the test is applied or the method of using the last two prongs in these jurisdictions.

30. The first two prongs of proportionality resemble a means-ends review of the traditional reasonableness analysis, and they are applied relatively consistently across jurisdictions. Courts first determine if the ends of the restriction serve a legitimate purpose, and then assess whether the proposed restriction is a suitable means for furthering the same ends, meaning it has a rational connection with the purpose.

31. In the third prong, courts examine whether the restriction is necessary to achieve the desired end. When assessing the necessity of the measure, the courts consider whether a less intrusive alternative is available to achieve the same ends, aiming for minimal impairment. As elaborated above, this Court ***Anuradha Bhasin*** (supra), relying on suggestions given by some jurists,[83]

[82] We will be referring to certain facets of the proportionality enquiry employed by these countries in our judgment. The test is also employed in various other jurisdictions like Israel, New Zealand, and the European Union.
[83] See David Bilchitz at supra note 76.

emphasised the need to employ a moderate interpretation of the necessity prong. To conclude its findings on the necessity prong, this Court is *inter alia* required to undertake an overall comparison between the measure and its feasible alternatives.[84]

32. We will now delve into the fourth prong, the balancing stage, in some detail. This stage has been a matter of debate amongst jurists and courts. Some jurists believe that balancing is ambiguous and value-based.[85] This stems from the premise of rule-based legal adjudication, where courts determine entitlements rather than balancing interests. However, proportionality is a standard-based review rather than a rule-based one. Given the diversity of factual scenarios, the balancing stage enables judges to consider various factors by analysing them against the standards proposed by the four prongs of proportionality. This ensures that all aspects of a case are carefully weighed in decision-making. This perspective finds support in the work of jurists who believe that constitutional

[84] In *Anuradha Bhasin* (supra), the Court stipulated the following requirement for a conclusion of findings on the necessity prong: "…A judgment must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights…"

[85] See Jochen von Bernstroff, Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to Realisation of Collective and Individual Self Determination, Reasoning Rights – Comparative Judicial Engagement, (Ed. Liaora Lazarus); Bernhard Schlink, 'Abwägung im Verfassungsrecht', Duncker & Humblot, 1976, and Francisco J. Urbina, 'Is It Really That Easy? A Critique of Proportionality and Balancing as Reasoning' Canadian Journal of Law and Jurisprudence, 2014.

rights and restrictions/measures are both principles, and thus they should be optimised/balanced to their fullest extent.[86]

33. While balancing is integral to the standard of proportionality, such an exercise should be rooted in empirical data and evidence. In most countries that adopt the proportionality test, the State places on record empirical data as evidence supporting the enactment and justification for the encroachment of rights.[87] This is essential because the proportionality enquiry necessitates objective evaluation of conflicting values rather than relying on perceptions and biases. Empirical deference is given to the legislature owing to their institutional competence and expertise to determine complex factual legislation and policies. However, factors like lack of parliamentary deliberation and a failure to make relevant enquiries weigh in on the court's decision. In the absence of data and figures, there is a lack of standards by which proportionality *stricto sensu* can be determined. Nevertheless, many of the constitutional courts

[86] According to Robert Alexy, the 'Law of Balancing' is as follows: "…the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other…" See Robert Alexy, A Theory of Constitutional Rights (Julian Rivers, trans. Oxford Univ. Press 2002).

[87] For instance, in Canada, where the doctrine of proportionality is employed by courts, a cabinet directive requires the standard to be incorporated into law-making. These guidelines stipulate that prior to enactment of laws, the matter and its alternate solutions must be analysed, the relevant ministerial department should engage in consultation with those who have an interest in the matter, and they should analyse the impact of the proposed solution. See Cabinet Directive on Law-making in Guide to Making Federal Acts and Regulations (2nd edn, Government of Canada).

have employed the balancing stage 'normatively'[88] by examining the weight of the seriousness of the right infringement against the urgency of the factors that justify it. Examination under the first three stages requires the court to first examine scientific evidence, and where such evidence is inconclusive or does not exist and cannot be developed, reason and logic apply. We shall subsequently be referring to the balancing prong during our application of the test of proportionality.

34. In Germany, the courts enjoy a high judicial discretion. The parliament and the judiciary in Germany have the same goal, that is, to realise the values of the German Constitution.[89] Canadian courts, some believe, in practice give wider discretion to the legislature when a restriction is backed by sufficient data and evidence.[90] The constitutional court in South Africa, as per some jurists, collectively applies the four prongs of proportionality instead of a structured application.[91] While proportionality is the predominant doctrine in Australia, an alternate calibrated scrutiny test is applied by a few judges.[92] It is based on the premise that a

[88] The first and second steps, legitimate aim and rational connection prong, and to some extent necessity prong, are factual.
[89] See Article 1 and 20, Basic Law for the Federal Republic of Germany.
[90] Niels Petersen, 'Proportionality and judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa, (CUP 2017).
[91] *Ibid.*
[92] See Annexure A.

contextual, instead of broad standard of review, is required to be adopted for constitutional adjudication.

35. Findings of empirical legal studies provide a more solid foundation for normative reasoning[93] and enhance understanding of the relationship between means and ends.[94] In our view, proportionality analyses would be more accurate when empirical inquiries on causal relations between a legislative measure under review and the ends of such a measure are considered. It also leads to better and more democratic governance. While one cannot jump from "is" to "ought", to reach an "ought" conclusion, one has to rely on accurate knowledge of "is", for "is" and "ought" to be united.[95] While we emphasise the need of addressing the quantitative/empirical deficit for a contextual and holistic balancing analysis, the pitfalls of selective data sharing must be kept in mind. After all, if a measure becomes a target, it ceases to be a good measure.[96]

36. To avoid this judgment from becoming complex, I have enclosed as an annexure a chart giving different viewpoints on the doctrine of proportionality as a test for judicial review exercised by the courts

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[93] See Yun-chien Chand & Peng-Hsiang Wang, *The Empirical Foundation of Normative Arguments in Legal Reasoning* (Univ. Chicago Coase-Sandor Inst. For L. & Econ., Res. Paper No. 745, 2016).
[94] Lee Epstein & Andrew D. Martin, *An Introduction to Empirical Legal Research* 6 (2014).
[95] *See* Joshua B. Fischman, *Reuniting "Is" and "Ought" in Empirical Legal Scholarship,* 162 U. Pa. L. Rev. 117 (2013).
[96] Marilyn Strathern, Improving Ratings: Audit in the British University System, European review, Vol. 5 Issue 3, pp. 305-321 (1997).

to test the validity of the legislation. The same is enclosed as Annexure-A to this judgment.[97]

37. When we turn to the reply or the defence of the Union of India in the present case, which we have referred to above,[98] the matter of concern is the first submission made regarding the purpose and rationale of the Scheme and amendments to the Finance Act of 2017. Lest remains any doubt, I would like to specifically quote from the transcript of hearing dated 01.11.2023, where on behalf of the Union of India it was submitted:

> "..the bottom line is this. What was really found? That what is the reason, why a person who contributes to a political party chooses the mode of unclean money as a payment mode and Your Lordships would immediately agree with me if we go by the practicalities of life. What happens is, suppose one state is going for an election. There are two parties, there are multiple parties, but by and large there are two parties which go neck to neck. Suppose I am a contractor. I'm not a company or anything. I am a contractor and I'm supposed to give my political contribution to Party A and Party B or Party A or Party B, as the case may be. But the fear was if I give by way of accounted money or by clean money, by way of cheque, it would be easily identifiable. If I give to party A and Party B forms the Government, I would be facing victimization and retribution and vice versa. If I give money to Party B and Party A continues to be in Government, then I would be facing retribution or victimization. Therefore, the safest course was to pay by cash, so that none of the parties know what I paid to which party, and both parties are happy that I have paid something. So, that, the payment by cash ensured confidentiality. Both

[97] Annexure A should not be read as an opinion of this Court or even as *obiter dicta* expressed by this Court. The Annexure is only for the purpose of pointing out different viewpoints on the test of proportionality.
[98] See paragraph 23 of this judgment.

> parties would say that one party would be given 100 crores, one party would be given 40 crores, depending upon my assessment of their winnability. But both would not know who is paid what. My Lord, sometimes what used to happen is in my business, I get only clean money or substantial part of the clean money, but practicalities require that I contribute to the political parties, and practicality again requires that I contribute with a degree of confidentiality so that I am not victimized in the future. And therefore clean money used to be converted into unclean money. White money is being converted into black money so that it can be paid, according to them anonymously, and according to me with confidentiality. And this is disastrous for the economy when white money is converted into black money."

While introducing the Finance Act of 2017, the then Finance Minister had elucidated that the main purpose of the Scheme was to curb the flow of black money in electoral finance.[99] This, it is stated, could be achieved only if information about political donations and the donor were kept confidential.[100] It was believed that this would incentivise donations to political parties through banking channels.

38. I am of the opinion that retribution, victimisation or retaliation cannot by any stretch be treated as a legitimate aim. This will not satisfy the legitimate purpose prong of the proportionality test. Neither is the Scheme nor the amendments to the Finance Act, 2017, rationally connected to the fulfilment of that purpose, namely, to

[99] See Speech of Arun Jaitley, Minister of Finance, at paragraph 165, Budget 2017-18.
[100] *Ibid.*

counter retribution, victimisation or retaliation in political donations. In our opinion, it will also not satisfy the necessity stage of the proportionality even if we have to ignore the balancing stage.

39. Retribution, victimisation or retaliation against any donor exercising their choice to donate to a political party is an abuse of law and power. This has to be checked and corrected. As it is a wrong, the wrong itself cannot be a justification or a purpose. The argument, therefore, suffers on the grounds of inconsistency and coherence as it seeks to perpetuate and accept the wrong rather than deal with the malady and correct it. The inconsistency is also apparent as the change in law, by giving a cloak of secrecy, leads to severe restriction and curtailment of the collective's right to information and the right to know, which is a check and counters cases of retribution, victimisation and retaliation. Transparency and not secrecy is the cure and antidote.

40. Similarly, the second argument that the donor may like to keep his identity anonymous is a mere *ipse dixit* assumption. The plea of infringement of the right to privacy has no application at all if the donor makes the contribution, that too through a banking channel, to a political party. It is the transaction between the donor and the third person. The fact that donation has been made to a political

party has to be specified and is not left hidden and concealed.[101] What is not revealed is the quantum of the contribution and the political party to whom the contribution is made. Further, when a donor goes to purchase a Bond, he has to provide full particulars and fulfil the KYC norms of the bank.[102] His identity is then asymmetrically known to the person and the officers of the bank from where the Bond is purchased.[103] Similarly, the officers in the branch of the authorised bank[104] where the political party has an account and encashes the Bond are known to the officers in the said bank.[105]

41. The argument raised by the Union of India that details can be revealed when an order is passed by a court or when it is required for investigation pursuant to registration of a criminal case[106] overlooks the fact that it is their stand that the identities of the contributors/donors should be concealed because of fear of retaliation, victimisation and reprisal. That fear would still exist as the identity of the purchaser of the Bond can always be revealed upon registration of a criminal case or by an order/direction of the

[101] Section 182(3) of the Companies Act, 2013 requires companies to mention the total political contributions made.
[102] Paragraph 4 of the Scheme.
[103] In terms of paragraph 2(b) of the Scheme, only State Bank of India and its specified branches are allowed to issue Bonds.
[104] *Ibid.*
[105] Paragraph 3(4) of the Scheme.
[106] See paragraph 7(4) of the Scheme.

court. Thus, the fear of reprisal and vindictiveness does not evaporate. The so-called protection exists only on paper but in practical terms is not a good safeguard even if we accept that the purpose is legitimate. It fails the rational nexus prong.

42. The fear of the identities of donors being revealed exists in another manner. Under the Scheme, political parties in power may have asymmetric access to information with the authorised bank. They also retain the ability to use their power and authority of investigation to compel the revelation of Bond related information.[107] Thus, the entire objective of the Scheme is contradictory and inconsistent.

43. Further, it is the case of the Union of India that parties in power at the Centre and State are the recipients of the highest amounts of donations through Bonds. If that is the case, the argument of retribution, victimisation and retaliation is tempered and loses much of its force.[108]

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[107] *Ibid.*

[108] In *Brown* v. *Socialist Workers Comm.*, 459 U.S. 87 (1982), the Supreme Court of the United States of America held that disclosure laws requiring the reporting of names and addresses of every campaign contributor could be waived when "specific evidence of hostility, threats, harassment and reprisals" existed, thus adopting a case-by-case approach. Marshall J., delivering the opinion of the court observed that the Socialist Workers Party, a minor political party had historically been the object of harassment by government officials and private parties. Therefore, the court held that the government was prohibited from compelling disclosures from the said party, a minor political party, since there existed a reasonable probability that the compelled disclosures would subject their donors, if identified, to threats, harassment or reprisals.

44. The rational connection test fails since the purpose of curtailing black or unaccounted-for money in the electoral process has no connection or relationship with the concealment of the identity of the donor. Payment through banking channels is easy and an existing antidote. On the other hand, obfuscation of the details may lead to unaccounted and laundered money getting legitimised.

45. The RBI had objected to the Scheme since the Bonds could change hands after they have been issued. There is no check for the same as the purchaser who has completed the KYC, whose identity is thereupon completely concealed, may not be the actual contributor/ donor. In fact, the Scheme may enable the actual contributor/donor to not leave any traceability or money trail.

46. Money laundering can be undertaken in diverse ways. Political contributions for a *quid pro quo* may amount to money laundering, as defined under the Prevention of Money Laundering Act, 2002[109]. The Financial Action Task Force[110] has observed that the signatory States are required to check money laundering on account of contributions made to political parties.[111] Article 7(3) of the United Nations Convention against Corruption, 2003 mandates the state

[109] For short, "PMLA".
[110] For short, "FATF".
[111] Paragraph 3, Section B, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation – The FATF Recommendations, 2012.

parties to enhance transparency in political funding of the candidates and parties.[112] The said convention is signed and ratified by India. By ensuring anonymity, the policy ensures that the money laundered on account of *quid pro quo* or illegal connection escapes eyeballs of the public.

47. The economic policies of the government have an impact on business and commerce. Political pressure groups promote different agendas, including perspectives on economic policies. As long as these pressure groups put forward their perspective with evidence and data, there should not be any objection even if they interact with elected representatives. The position would be different if monetary contributions to political parties were made as a *quid pro quo* to secure a favourable economic policy. This would be an offence under the Prevention of Corruption Act, 1988 and also under the PMLA. Such offences when committed by political parties in power can never see the light of the day if secrecy and anonymity of the donor is maintained.

48. In view of the aforesaid observations, the argument raised by the petitioners that there is no rational connection between the

[112] See also United Nations General Assembly Resolution A/RES/S-32/1, 02.06.2021, para 12.

measure and the purpose, which is also illegitimate, has merit and should be accepted.

49. On the question of alternative measures, that is the necessity prong of the proportionality test, it is accepted that post the amendments brought about by the Finance Act, 2017, political parties cannot receive donations in cash for amounts above Rs.2,000/-. However, political parties do not have to record the details and particulars of donations received for amounts less than Rs.20,000/-.[113] Therefore, the reduction of the upper limit of cash donations from Rs.20,000/- to Rs.2,000/- serves no purpose. It is open to the political parties to bifurcate the law and camouflage larger donations in smaller stacks. There is no way or method to verify the donor if the amount shown in the books of the political party is less than Rs.2,000/-.

50. It is an accepted position that the Electoral Trust Scheme[114] was introduced in 2013 to ensure the secrecy of contributors. As per the Trust Scheme, contributions could be made by a person or body corporate to the trust. The trust would thereafter transfer the amount to the political party. The trust is, therefore, treated as the contributor to the political party. Interestingly, it is the ECI that had

[113] This is inapplicable to Bonds under *proviso* (b) to Section 13A of the Income Tax Act, 1961.
[114] For short, "Trust Scheme".

issued guidelines dated 06.06.2014 whereby the trusts were required to specify and give full particulars to the ECI of the depositors with the trust and amounts which were subsequently transferred as a contribution to the political party. The guidelines were issued by the ECI to ensure transparency and openness in the electoral process.[115]

51. The trust can have multiple donors. Similarly, contributions are made by the trust to multiple political parties. The disclosure requirements provided in ECI's guidelines dated 06.06.2014 only impose disclosure requirements at the inflow and outflow points of the trust's donations, that is, the trust is required to provide particulars of its depositors and the amounts donated to political parties, including the names of the political parties. Thus, the Trust Scheme protects the anonymity of the donors *vis-à-vis* their contributions to the political party. When we apply the necessity test propounded in ***Anuradha Bhasin*** (supra)[116], the Trust Scheme

[115] Similarly, early campaign finance laws in the United Kingdom permitted trusts to donate to political parties. It came to be disallowed since it was contrary to openness and accountability. See Suchindran Bhaskar Narayan and Lalit Panda, Money and Elections – Necessary Reforms in Electoral Finance, Vidhi 2018 at p. 19. See also Lord Neill of Bladen, QC, 'Fifth Report of the Committee on Standards in Public Life: The Funding of Political Parties in the United Kingdom', 1998 pp 61-62.

[116] As elaborated in paragraph 27] of this judgement, *Anuradha Bhasin* (supra) proposes a four sub-pronged inquiry at the necessity stage of proportionality, that is (MN1) to (MN4). To arrive at the conclusion of the necessity inquiry, this Court has proposed at (MN4) that: "…an overall comparison (and balancing exercise) must be undertaken between the measure and the alternatives. A judgment must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights (the comparative component)."

achieves the objective of the Union of India in a real and substantial manner and is also a less restrictive alternate measure in view of the disclosure requirements, *viz.* the right to know of voters. The Trust Scheme is in force and is a result of the legislative process. In a comparison of limited alternatives, it is a measure that best realises the objective of the Union of India in a real and substantial manner without significantly impacting the fundamental right of the voter to know. The ECI, if required, can suitably modify the guidelines dated 06.06.2014.

52. I would now come to the fourth prong. I would begin by first referring to the judgment cited by Hon'ble the Chief Justice in the case of ***Campbell*** v. ***MGM Limited***[117]. This judgment adopts double proportionality standard to adequately balance two conflicting fundamental rights. Double proportionality has been distinguished from the single proportionality standard in paragraph 152 of the judgment authored by Hon'ble the Chief Justice. ***Campbell*** (supra) states that the single proportionality test and the principle of reasonableness are applied to determine whether a private right claim offers sufficient justification for the interference with the fundamental rights. However, this test may not apply when two

[117] [2004] 2 AC 457.

fundamental rights are at conflict and one has to balance the application of one right and restriction of the other.

53. In ***Campbell*** (supra), Baroness Hale has suggested a three-step approach to balance conflicting fundamental rights, when two rights are in play. The first step is to analyse the comparative importance of the fundamental rights being claimed in the particular case. In the second step, the court should consider the justification for interfering with or restricting each of these rights. The third step requires the application of a proportionality standard to both these rights.

54. In a subsequent decision, the House of Lords (Lord Steyn) in ***In re.S***[118], distilled four principles to resolve the question of conflict of rights as under:

> "17. (...) First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

[118] [2005] 1 AC 593.

55. The fourth principle, that is, the ultimate balancing test, was elaborated upon by Sir Mark Potter in ***In Re. W***[119] in the following terms:

> "53. (...) each Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or "trumps" the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out."

56. Fundamental rights are not absolute, legislations/policies restricting the rights may be enacted in accordance with the scheme of the Constitution. However, it is now well settled that the provisions of fundamental rights in Part III of the Constitution are not independent silos and have to be read together as complementary rights.[120] Therefore, the thread of reasonableness applies to all such restrictions.[121] Secondly, Article 14, as observed by the Hon'ble Chief Justice in his judgment[122] includes the facet of formal equality

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[119] [2005] EWHC 1564 (Fam).
[120] *Rustom Cavasjee Cooper* v. *Union of India*, (1970) 1 SCC 248; *K.S. Puttaswamy (9J) (Privacy)* (supra), and *Maneka Gandhi* v. *Union of India and Another*, (1978) 1 SCC 248.
[121] The test of single proportionality will apply.
[122] See paragraphs 191 to 195 of the Hon'ble Chief Justice's judgment.

and substantive equality. Thus, the principle 'equal protection of law' requires the legislature and the executive to achieve factual equality. This principle can be extended to any restriction on fundamental rights which must be reasonable to the identified degree of harm. If the restriction is unreasonable, unjust or arbitrary, then the law should be struck down. Further, it is for the legislature to identify the degree of harm. I have referred to the said observation in the context that there appears to be a divergent opinion in ***K.S. Puttaswamy (9-J) (Privacy)*** (supra) as to whether right of privacy is an essential component for effective fulfilment of all fundamental rights or can be held to be a part or a component of Article 21 and Article 19(1)(a) of the Constitution.

57. When we apply the fourth prong, that is the balancing prong of proportionality, I have no hesitation or doubt, given the findings recorded above, that the Scheme falls foul and negates and overwhelmingly disavows and annuls the voters right in an electoral process as neither the right of privacy nor the purpose of incentivising donations to political parties through banking channels, justify the infringement of the right to voters. The voters right to know and access to information is far too important in a democratic set-up so as to curtail and deny 'essential' information on the pretext of privacy and the desire to check the flow of

unaccounted for money to the political parties. While secret ballots are integral to fostering free and fair elections, transparency—not secrecy—in funding of political parties is a prerequisite for free and fair elections. The confidentiality of the voting booth does not extend to the anonymity in contributions to political parties.

58. In ***K.S. Puttasamy (9-J) (Privacy)*** (supra), all opinions accept that the right to privacy has to be tested and is not absolute. The right to privacy must yield in given circumstances when dissemination of information is legitimate and required in state or public interest. Therefore, the right to privacy is to be applied on balancing the said right with social or public interest. The reasonableness of the restriction should not outweigh the particular aspect of privacy claimed.[123] Sanjay Kishan Kaul, J., in his opinion in ***K.S. Puttasamy (9-J) (Privacy)*** (supra), has said that restriction on right to privacy may be justifiable and is subject to the principle of proportionality when considering the right to privacy in relation to its function in society.

59. As observed above, the right to privacy operates in the personal realm, but as the person moves into communal relations and activities such as business and social interaction, the scope of

[123] While giving the aforesaid finding, we are applying the single proportionality test.

personal space shrinks contextually.[124] In this context, the High Court of South Africa in ***My Vote Counts NPC*** v. ***President of the Republic of South Africa and Ors.***[125] observes that:

> "(...) given the public nature of political parties and the fact that the private funds they receive have a distinctly public purpose, their rights to privacy can justifiably be attenuated. **The same principles must, as a necessary corollary, apply to their donors.** (...)"
>
> (emphasis supplied)

60. The great underlying principle of the Constitution is that rights of individuals in a democratic set-up is sufficiently secured by ensuring each a share in political power.[126] This right gets affected when a few make large political donations to secure selective access to those in power. We have already commented on pressure groups that exert such persuasion, within the boundaries of law. However, when money is exchanged as *quid pro quo* then the line between persuasion and corruption gets blurred.

61. It is in this context that the High Court of Australia in ***Jeffery Raymond McCloy and Others*** v. ***State of New South Wales and Another***[127], observes that corruption can be of different kinds. When a wealthy donor makes contribution to a political party in

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[124] See *Bernstein and Ors.* v. *Bester NO and Others*, (1996) ZACC 2, para 67.
[125] *My Vote Counts NPC* v. *President of the Republic of South Africa and Ors.* (2017) ZAWCHC 105, para 67.
[126] Harrison Moore, The Constitution of the Commonwealth of Australia, p.329 (1902).
[127] (2015) HCA 34.

return of a benefit, it is described as *quid pro quo* corruption. More subtle corruption arises when those in power decide issues not on merits or the desires of their constituencies, but according to the wishes and desires of those who make large contributions. This kind of corruption is described as 'clientelism'. This can arise from the dependence[128] on the financial support of a wealthy patron to a degree that it compromises the expectation, fundamental to representative democracy, that public power will be exercised in public interest. This affects the vitality as well as integrity of the political branches of government. While *quid pro quo* and clientelistic corruption erodes quality and integrity of government decision making, the power of money may also pose threat to the electoral process itself. This phenomenon is referred to as 'war-chest' corruption.[129]

62. In ***Jefferey Raymond*** (supra), the High Court of Australia had referred to the decision of the Supreme Court of Canada in ***Harper*** v. ***Canada (Attorney General)***[130], which upheld the legislative restriction on electoral advertising. In ***Harper*** (supra), the Supreme

[128] James Madison in the Federalist Paper No. 52 notes that a government must "depend on the people alone". This condition, according to Professor Lawrence Lessig, has two elements – first, it identifies a proper dependency ("on the people") and second, it describes that dependence as exclusive ("alone").
[129] *See Federal Election Commission* v. *National Right to Work Committee*, 459 U.S. 197 (1982), where the petitioners submitted: "...substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions..."
[130] [2004] 1 SCR 827.

Court of Canada has held that the State can provide a voice to those who otherwise might not be heard and the State can also restrict voices that dominate political discourse so that others can be heard as well.

63. The Supreme Court of the United States in ***Buckley*** v. **R Valeo**[131] has commented on the concern of *quid pro quo* arrangements and its dangers to a fair and effective government. Improper influence erodes and harms the confidence in the system of representative government. Contrastingly, disclosure provides the electorate with information as to where the political campaign money comes from and how it is spent. This helps and aides the voter in evaluating those contesting elections. It allows the voter to identify interests which candidates are most likely to be responsive to, thereby facilitating prediction of future performance in office. Secondly, it checks actual corruption and helps avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. Relying upon ***Grosjean*** v. ***American Press Co.***[132], it holds that informed public opinion is the most potent of all restraints upon misgovernment. Thirdly, record keeping, reporting

[131] 424 U.S. 1 (1976).
[132] 297 U.S. 233 (1936).

and disclosure are essential means of gathering data necessary to detect violations of contribution limitations.

64. In ***Nixon, Attorney General of Missouri, et al*** v. ***Shrink Missouri Government PAC et al***,[133] the Supreme Court of the United States observes that large contributions given to secure a political *quid pro quo* undermines the system of representative democracy. It stems public awareness of the opportunities for abuse inherent in a regime of large contributions. This effects the integrity of the electoral process not only in the form of corruption or *quid pro quo* arrangements, but also extending to the broader threat of the beneficiary being too compliant with the wishes of large contributors.

65. Recently, a five judge Constitution Bench of this Court in ***Anoop Baranwal*** v. ***Union of India***[134] has highlighted the importance of purity of electoral process in the following words:

> "215. …Without attaining power, men organised as political parties cannot achieve their goals. Power becomes, therefore, a means to an end. The goal can only be to govern so that the lofty aims enshrined in the directive principles are achieved while observing the fundamental rights as also the mandate of all the laws. What is contemplated is a lawful Government. So far so good. What, however, is disturbing and forms as we understand the substratum of the complaints of the petitioner is the pollution of the stream or the sullying

[133] 528 U.S. 377 (2000).
[134] (2023) 6 SCC 161.

> of the electoral process which precedes the gaining of power. Can ends justify the means?
>
> 216. There can be no doubt that the strength of a democracy and its credibility, and therefore, its enduring nature must depend upon the means employed to gain power being as fair as the conduct of the Government after the assumption of power by it. The assumption of power itself through the electoral process in the democracy cannot and should not be perceived as an end. The end at any rate cannot justify the means. The means to gain power in a democracy must remain wholly pure and abide by the Constitution and the laws. An unrelenting abuse of the electoral process over a period of time is the surest way to the grave of the democracy. Democracy can succeed only insofar as all stakeholders uncompromisingly work at it and the most important aspect of democracy is the very process, the electoral process, the purity of which alone will truly reflect the will of the people so that the fruits of democracy are truly reaped.
>
> 217. The essential hallmark of a genuine democracy is the transformation of the "Ruled" into a citizenry clothed with rights which in the case of the Indian Constitution also consist of fundamental rights, which are also being freely exercised and the concomitant and radical change of the ruler from an "Emperor" to a public servant. With the accumulation of wealth and emergence of near monopolies or duopolies and the rise of certain sections in the Media, the propensity for the electoral process to be afflicted with the vice of wholly unfair means being overlooked by those who are the guardians of the rights of the citizenry as declared by this Court would spell disastrous consequences."

66. The Law Commission of India in its 255th Report noted the concern of financial superiority translating into electoral advantage.[135] It was observed that lobbying and capture give undue importance to big

[135] Law Commission of India, Electoral Reforms, Report No. 255, March 2015.

donors and certain interest groups, at the expense of the ordinary citizen, violating "the right of equal participation of each citizen in the polity."[136] While noting the candidate-party dichotomy in the regulations under Section 77 of the Representation of the People Act, 1951, the Law Commission of India recommends to require candidates to maintain an account of contributions received from their political party (not in cash) or any other permissible donor.

67. At this stage, we would like to refer to the data as available on the website of the ECI and the data submitted by the petitioners for a limited purpose and objective to support our reasoning while applying balancing. We have not *stricto sensu* applied proportionality as the data is not sufficient for us. I also clarify that we have not opened the sealed envelope given by the ECI pursuant to the directions of this Court dated 02.11.2023.

68. An analysis of the annual audit reports of political parties from 2017-18 to 2022-23 showcases party-wise donations received through the Bonds as reproduced below:

PARTY-WISE DONATION THROUGH BONDS (IN RS. CR)

Party	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23
BJP	210.00	1,450.890	2,555.000	22.385	1,033.7000	1294.1499
INC	5.00	383.260	317.861	10.075	236.0995	171.0200
AITC	0.00	97.280	100.4646	42.000	528.1430	325.1000
NCP	0.00	29.250	20.500	0.000	14.0000	--
TRS	0.00	141.500	89.153	0.000	153.0000	--

[136] ***R.C.Poudyal*** v. ***Union of India and Others***, (1994) Supp 1 SCC 324.

TDP	0.00	27.500	81.600	0.000	3.5000	34.0000
YSR-C	0.00	99.840	74.350	96.250	60.0000	52.0000
BJD	0.00	213.500	50.500	67.000	291.0000	152.0000
DMK	0.00	0.000	45.500	80.000	306.0000	185.0000
SHS	0.00	60.400	40.980	0.000	--	--
AAP*	0.00	--	17.765	5.950	25.1200	45.4500
JDU	0.00	0.000	13.000	1.400	10.0000	--
SP	0.00	0.000	10.840	0.000	3.2100	0.0000
JDS	6.03	35.250	7.500	0.000	0.0000	--
SAD	0.00	0.000	6.760	0.000	0.5000	0.0000
AIADMK	0.00	0.000	6.050	0.000	0.0000	0.0000
RJD	0.00	0.000	2.500	0.000	0.0000	--
JMM	0.00	0.000	1.000	0.000	0.0000	--
SDF	0.00	0.500	0.000	0.000	0.0000	0.0000
MGP	0.00	0.000	0.000	0.000	0.5500	--
TOTAL	**221.03**	**2,539.170**	**3,441.324**	**325.060**	**2,664.8225**	**--**

Asterisk (*) means that the AAP had declared their donations through Bonds/Electoral Trust, but the party had not declared a separate amount for Bonds.

69. It is clear from the available data that majority of contribution through Bonds has gone to political parties which are ruling parties in the Centre and the States. There has also been a substantial increase in contribution/donation through Bonds.

70. Petitioner no. 1 – Association for Democratic Reforms has submitted the following table which showcases party-wise donation by corporate houses to national parties:

PARTY-WISE CORPORATE DONATION (NATIONAL PARTIES) (IN RS. Cr)

Party	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	Total
BJP	**515.500**	**400.200**	**698.140**	**720.407**	**416.794**	**548.808**	**3,299.8500**
INC	36.060	19.298	127.602	133.040	35.890	54.567	**406.4570**
NCP	6.100	1.637	11.345	57.086	18.150	15.280	**109.5980**
CPI(M)	3.560	0.872	1.187	6.917	9.815	6.811	**29.1615**
AITC	2.030	0.000	42.986	4.500	0.000	0.250	**49.7660**
CPI	0.003	0.003	0.000	0.000	0.000	0.000	**0.0055**
BSP	0.000	0.000	0.000	0.000	0.000	0.000	**0.0000**
TOTAL	**563.253**	**422.010**	**881.260**	**921.950**	**480.649**	**625.716**	**3,894.8380**

As per the said table, the data shows that the party-wise donation by the corporate houses has been more or less stagnant from the years 2016-17 to 2021-22. We do not have the comments or official details in this regard from the Union of India or the ECI. The figures support our conclusion, but I would not, without certainty, base my analysis on these figures. However, we do have data of denomination/sale of Bonds, as submitted by the petitioners, during the 27 phases from March 2018 to July 2023, which is as under:

DENOMINATION WISE SALE OF EB DURING 27 PHASES (MARCH, 2018-JULY, 2023)

Denomination	No. of Electoral Bonds Sold	Amount (In Rupees)
1 Crore	12,999 (54.13%)	12,999 Crore (94.25%)
10 Lakhs	7,618 (31.72%)	761.80 Crore (5.52%)
1 Lakh	3,088 (12.86%)	30.88 Crore (0.22%)
10 Thousand	208 (0.86%)	20.80 Lakh (0.001%)
1 Thousand	99 (0.41%)	99,000
Total	**24,012**	**13791.8979 Cr.**

Analysis of this data shows that more than 50% of the Bonds in number, and 94% of the Bonds in value terms were for Rs.1 crore. This supports our reasoning and conclusion on the application of the doctrine of proportionality. This is indicative of the quantum of corporate funding through the anonymous Bonds.

71. The share of income from unknown sources for national parties rose from 66% during the years 2014-15 to 2016-17 to 72% during the years 2018-19 to 2021-22. Between the years 2019-20 to 2021-22 the Bond income has been 81% of the total unknown income of national parties. The total unknown income, that is donations made under Rs.20,000/-, sale of coupons etc. has not shown ebbing and has substantially increased from Rs.2,550 crores during the years 2014-15 to 2016-17 to Rs.8,489 crores during the years 2018-19 to 2021-22. To this we can add total income of the national political parties without other known sources, which has increased from Rs.3,864 crores during the years 2014-15 to 2016-17 to Rs.11,829 crores during the years 2018-19 to 2021-22. The Bonds income between the years 2018-19 to 2021-22 constitutes 58% of the total income of the national political parties.[137]

72. Based on the analysis of the data currently available to us, along with our previous observation asserting that voters' right to know supersedes anonymity in political party funding, I arrive at the conclusion that the Scheme fails to meet the balancing prong of the proportionality test. However, I would like to reiterate that I have not

[137] "Parties' unknown income rise despite electoral bonds", The Hindu, 02.11.2023, pg.7.

applied proportionality *stricto sensu* due to the limited availability of data and evidence.

73. I respectfully agree with the reasoning and the finding recorded by Hon'ble the Chief Justice, holding that the amendment to Section 182 of the Companies Act, deleting the first *proviso* thereunder should be struck down. While doing so, I would rather apply the principle of proportionality which, in my opinion, would subsume the test of manifest arbitrariness.[138] In addition, the claim of privacy by a corporate or a company, especially a public limited company would be on very limited grounds, restricted possibly to protect the privacy of the individuals and persons responsible for conducting the business and commerce of the company. It will be rather difficult for a public (or even a private) limited company to claim a violation of privacy as its affairs have to be open to the shareholders and the public who are interacting with the body corporate/company. This principle would be equally, with some deference, apply to private limited companies, partnerships and sole proprietorships.

[138] The proportionality test, as adopted and applied by us, essentially checks, invalidates and does not condone manifest arbitrariness. Proportionality analysis recognizes the thread of reasonableness which is the underlying principle behind the first three prongs, legitimate aim, rational connection and necessity test. The balancing analysis of the permissible degree of harm for a constitutionally permissible purpose effectuates the guarantee of reasonableness. Therefore, any legislative action which is manifestly arbitrary, would be disproportionate and will fall foul when we apply the principle of proportionality. See also *Shayara Bano* v. *Union of India*, (2017) 9 SCC 1, where the Court held at paragraph 95, that rationality, logic and reasoning are the triple underpinnings of the test of manifest arbitrariness.

74. In consonance with the above reasoning and on application of the doctrine of proportionality, *proviso* to Section 29C(1) of the Representation of the People Act 1951, Section 182(3) of the Companies Act 2013 (as amended by the Finance Act 2017), Section 13A(b) of the Income Tax Act 1961 (as amended by the Finance Act 2017), are held to be unconstitutional. Similarly, Section 31(3) of the RBI Act 1934, along with the Explanation enacted by the Finance Act 2017, has to be struck down as unconstitutional, as it permits issuance of Bonds payable to a bearer on demand by such person.

75. The petitioners have not argued that corporate donations should be prohibited. However, it was argued by some of the petitioners that coercive threats are used to extract money from businesses as contributions virtually as protection money. Major opposition parties, which may come to power, are given smaller amounts to keep them happy. It was also submitted that there should be a cap on the quantum of donations and the law should stipulate funds to be utilised for political purposes given that the income of the political parties is exempt from income tax. Lastly, suggestions were made that corporate funds should be accumulated and the corpus equitably distributed amongst national and regional parties. I have

not in-depth examined these aspects to make a pronouncement. However, the issues raised do require examination and study.

76. By an interim order dated 26.03.2021, this Court in the context of contributions made by companies through Bonds had *prima facie* observed that the voter would be able to secure information about the funding by matching the information of aggregate sum contributed by the company as required to be disclosed under Section 182(3) of the Companies Act, as amended by the Finance Act 2017, with the information disclosed by the political party. Dr. D.Y. Chandrachud, Hon'ble the Chief Justice, rightly observes in his judgment that this exercise would not reveal the particulars of donations, including the name of the donor.

77. By the order dated 02.11.2023, this Court had asked for ECI's compliance with the interim order of this Court dated 12.04.2019. Relevant portion whereof is reproduced below:

> "In the above perspective, according to us, the just and proper interim direction would be to require all the political parties who have received donations through Electoral Bonds to submit to the Election Commission of India in sealed cover, detailed particulars of the donors as against the each Bond; the amount of each such bond and the full particulars of the credit received against each bond, namely, the particulars of the bank account to which the amount has been credited and the date of each such credit."

The intent of the order dated 12.04.2019 is that the ECI will continue to maintain full particulars of the donors against each Bond; the amount of each such Bond and the full particulars of the credit received against each Bond, that is, the particulars of the bank account to which the amount has been credited and the date of each such credit. This is clear from paragraph 14 of the order dated 12.04.2019 which had directed that the details mentioned in paragraph 13 of the order dated 12.04.2019 will be furnished forthwith in respect of the Bonds received by a political party till the date of passing of the order.

78. In view of the findings recorded above, I would direct the ECI to disclose the full particular details of the donor and the amount donated to the particular political party through Bonds. I would restrict this direction to any donations made on or after the interim order dated 12.04.2019. The donors/purchasers being unknown and not parties, albeit the principle of *lis pendens* applies, and it is too obvious that the donors/purchasers would be aware of the present litigation. Hence, they cannot claim surprise.

79. I, therefore, respectfully agree and also conclude that:

(i) the Scheme is unconstitutional and is accordingly struck down;

(ii) *proviso* to Section 29C(1) of the Representation of the People Act, Section 182(3) of the Companies Act, 2013, and Section 13A(b) of the Income Tax Act, 1961, as amended by the Finance Act, 2017, are unconstitutional, and are struck down;

(iii) deletion of *proviso* to Section 182(1) to the Companies Act of 2013, thereby permitting unlimited contributions to political parties is unconstitutional, and is struck down;

(iv) sub-section (3) to Section 31 of the RBI Act, 1934 and the Explanation thereto introduced by the Finance Act, 2017 are unconstitutional, and are struck down;

(v) the ECI will ascertain the details from the political parties and the State Bank of India, which has issued the Bonds, and the bankers of the political parties and thereupon disclose the details and names of the donor/purchaser of the Bonds and the amounts donated to the political party. The said exercise would be completed as per the timelines fixed by the Hon'ble the Chief Justice;

(vi) Henceforth, as the Scheme has been declared unconstitutional, the issuance of fresh Bonds is prohibited;

(vii) In case the Bonds issued (within the validity period) are with the donor/purchaser, the donor/purchaser may return them to the authorised bank for refund of the amount. In case the

Bonds (within the validity period) are with the donee/political party, the donee/political party will return the Bonds to the issuing bank, which will then refund the amount to the donor/purchaser. On failure, the amount will be credited to the Prime Ministers Relief Fund.

80. The writ petitions are allowed and disposed of in the above terms.

.....J.
(SANJIV KHANNA)

NEW DELHI;
FEBRUARY 15, 2024.

Annexure - A

Standards of Review - Proportionality & Alternatives

Proportionality is a standard-based model. It allows factual and contextual flexibility to judges who encounter diverse factual scenarios to analyse and decide the outcome of factual clashes against the standards. Proportionality, particularly its balancing prong, has been criticized by jurists who contend that legal adjudication should be rule-based rather than principle-based.[139] They argue that this provides legal certainty by virtue of rules being definitive in nature. In response, jurists in favour of balancing contend that neither rules nor principles are definitive but rather *prima facie*.[140] Therefore, both rights and legislations/policies are required to be balanced and realized to the optimum possible extent.

This jurisprudential clash is visible in the various forms and structures of adoptions of proportionality. Generally, two models can be differentiated from works of jurists.

1) **Model I** – Firstly, the traditional two stages of the means–end comparison is applied. After having ascertained the ***legitimate purpose*** of the law, the judge asks whether the imposed restriction is a suitable means of furthering this purpose (***rational connection***). Additionally in this model, the judge ascertains whether the restriction was ***necessary*** to achieve the desired end. The reasoning focuses on whether a less intrusive means existed to achieve the same ends (***minimal impairment/necessity***).

[139] Francisco J. Urbina, A Critique of Proportionality, American Journal of Jurisprudence, Vol 57, 2012. Also see Ronald Dworkin, Taking Rights Seriously (Bloomsbury 2013), pp 41-42.
[140] Robert Alexy, A Theory of Constitutional Rights, (translated by Julian Rivers, first published 2002, OUP 2010), pp. 47-48.

2) **Model II** – This model adds a fourth step to the first model, namely the ***balancing stage***, which weighs the seriousness of the infringement against the importance and urgency of the factors that justify it.

In the table provided below, we have summarised the different models of proportionality and its alternatives, as propounded by jurists and adopted by courts internationally. We have also summarized other traditional standards of review like the means-ends test and Wednesbury unreasonableness for contextual clarity. In the last column we have captured the relevant criticisms, as propounded by jurists, to each such model.

Test/Model	***Scope of Test/Model***	***Jurisdictions Applied***	***Criticism***
Four-stage Proportionality	In this model, all the four prongs of proportionality test are employed, including the final balancing stage. According to Robert Alexy, values and interests (rights of citizens and objects of legislations/policies) are both principles and principles are optimization requirements.[141]	**Germany** Balancing was adopted by the German Constitutional Court in the 1950s as a new methodology for intensive judicial review of rights-restricting legislation. It stems from the belief that the German	The main premise of the criticisms of balancing is the wide discretion available to judges. To capture three contemporary criticisms in brief: (i) it leads to a comparison of incommensurable values;[143] (ii) it fails to create predictability in the legal system and is

[141] See Robert Alexy, A Theory of Constitutional Rights (Julian Rivers, trans. Oxford Univ. Press 2002).
[143] See Francisco J. Urbina, 'Is It Really That Easy? A Critique of Proportionality and Balancing as Reasoning' Canadian Journal of Law and Jurisprudence, 2014; and Bernhard Schlink, 'Abwägung im Verfassungsrecht', Duncker & Humblot, 1976.

	They are norms and hence their threshold of satisfaction is not strict, and can happen in varying degrees. They must be satisfied to the greatest extent possible in the legal and factual scenarios, as they exist. All stages of the proportionality test therefore seek to optimize relative to what is legally and factually possible. ⇒ The rational connection and necessity prongs of the proportionality test are applicable to factual possibilities. ⇒ The balancing stage optimizes each principle within what is legally possible, by weighing the relevant competing principles.	Constitution posits an original idea of values, and the government and courts, both have a duty to realise these values.[142]	potentially dangerous for human rights;[144] and (iii) conversely, it is equally intrusive from the perspective of separation of powers.[145]

[142] See Article 1 and 20, Basic Law for the Federal Republic of Germany.
[144] Jochen von Bernstroff, Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to Realisation of Collective and Individual Self Determination, Reasoning Rights – Comparative Judicial Engagement, (Ed. Liaora Lazarus);
[145] *Ibid.*

	Alexy proposes the 'weight formula', which quantifies competing values (rights of individuals) and interests (objective of legislation/policy) by reducing them to numbers. It is a method of thinking about conflicting values/interests. **$W_{1.2} = (I_1 . W_1 . R_1) / (I_2 . W_2 . R_2)$** ⇒ **$W_{1.2}$** represents the concrete weight of principle **P_1** relative to the colliding principle **P_2**. ⇒ **I_1** stand for intensity of interference with **P_1**. **I_2** stands for importance of satisfying the colliding principle **P_2**. ⇒ **W_1** and **W_2** stand for abstract weights of colliding principles (**P_1 and P_2**). ⇒ When abstract weights are equal, as in case of collision of constitutional		

	rights (**W_1** and **W_2**) – they cancel each other out. ⇒ **R_1** and **R_2** stands for reliability of empirical and normative assumptions with regard to the question of how intensive the interpretation is. The weight formula is thereupon reduced to numbers on an exponential scale of 2. (i) The scale assigns following values to intensity of interference (**I**) and abstract weights (**W**)- light (**l**), moderate (**m**), and serious (**s**) – in numbers these are – **2^0, 2^1, 2^2 – i.e., 1, 2 and 4** respectively. (ii) To reliability (**R**), i.e., the epistemic side, the values assigned are –		

	reliable (**r**), plausible (**p**) and not evidently false (e) – in numbers these are - **2^0, 2^{-1}, 2^{-2} – i.e., 1, 0.5 and 0.25**		
Three-stage Proportionality	This model proposes limiting the proportionality enquiry to its first three prongs, i.e., minus the balancing stage. Von Bernstorff argues against *ad hoc* balancing based on two principal reasons: (i) ad hoc balancing fails to erect stable and predictable standards of human rights protection, allowing even the most intensive infringements of civil liberties to be conveniently balanced out of existence when the stakes are high enough; and (ii) the lack of predictability leads to a situation where every act of parliament is threatened,	**Canada** Canada prefers to resolve cases in the first three prongs. Only in limited instances, does the Canadian Supreme Court decide that a measure survives the first three prongs but nevertheless fails at the final balancing stage.[150] Despite this, past jurisprudence in Canada does affirm the	(i) In absence of the balancing stage, the courts must be mindful of certain analytical weaknesses of the necessity stage that can be dealt with at the balancing stage.[152] (ii) The core of the necessity test is whether an alternate measure is as effective in achieving the purpose as the measure under challenge, while being less restrictive. But often, considerations of balancing may become disguised in the necessity prong, as the court must

[150] See Charterpedia, Department of Justice, Government of Canada, available at: https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html. Also see Niels Petersen (supra).
[152] Niels Petersen, 'Proportionality and judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa, (CUP 2017).

	however well intentioned, in the judicial balancing exercise and thus *ad hoc* balancing is potentially overly intrusive from a separation of powers perspective.[146] He, however, defends the use of judicially established bright-line rules for specific cases where intensive interferences are at stake. The bright line rule brings clarity to a law or regulation that could be interpreted in multiple ways. Bright line rules constitute the 'core', 'substance' or 'essence' of a particular right, making human rights categorical instead of open-ended in nature.	significance of final balancing stage.[151]	confront uncertainty in weighing the efficacy of the alternatives.[153] (iii) Some jurists/courts have suggested a strict interpretation of necessity, where an alternate measure is only accepted as less restrictive when they prove to be as effective as the measure under challenge. David Bilchitz has also proposed that other alternatives must have both characteristics – equal realization of the purpose and lesser invasion/restriction on the right in question.[154]

[146] Jochen von Bernstroff, Proportionality Without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to Realisation of Collective and Individual Self Determination, Reasoning Rights – Comparative Judicial Engagement, (Ed. Liaora Lazarus); Also see Bernhard Schlink, 'Abwägung im Verfassungsrecht', Duncker & Humblot, 1976, pp. 192–219.
[151] *Ibid.* Also see Canada (Attorney General) *v.* JTI-Macdonald Corp., [2007] 2 S.C.R. 610, at paragraph 46; Alberta v. *Hutterian Brethren of Wilson Colony*, and [2009] 2 S.C.R. 567, at paragraphs 72-78.
[153] *Ibid.*
[154] David Bilchitz, Necessity and Proportionality: Towards a Balance Approach?, (Hart Publishing, Oxford and Portland, Oregon 2016).

	A stricter evaluation of evidence becomes crucial at the necessity stage for an objective standard of review, in contrast to *ad hoc* balancing. In Canada for instance, the onus of proof is on the person seeking to justify the limit, which is generally the government.[147] ⇒ The standard of proof is the civil standard or balance of probabilities.[148] ⇒ Where scientific or social science evidence is available, it will be required; ⇒ However, where such evidence is inconclusive, or does not exist and		David Blichitz's approach was followed in ***Aadhar (5J) (Privacy)*** (supra) case. This test was referenced in ***Anuradha Bhasin (supra)***, which applied a moderate interpretation of the necessity test. To conclude the findings of the necessity stage this Court in ***Anuradha Bhasin (supra)*** suggests that an overall comparison be undertaken between the measure and its feasible alternatives.

[147] ***R.*** *v.* ***Oakes*** [1986] 1 S.C.R. 103.
[148] ***Oakes*** (supra).

	cannot not be developed, reason and logic may suffice.[149]		
Means-ends Test	The doctrine is similar to a reasonableness inquiry, albeit with some variation. In Australia, for instance, courts enquire whether a law is 'reasonably appropriate and adapted' to achieving a legitimate end in a manner compatible with the constitutionally prescribed system of representative and responsible government.	**Australia** The test was followed in Australia before the development of proportionality and is not frequently used in contemporary times.	The test is simplistic and gives limited judicial flexibility. It does not account for diverse factual scenarios.
Calibrated Scrutiny (evolved means-ends test)	The essential elements of the approach are as follows:[155] ⇒ First, a judge determines the nature and intensity of the burden on the right by the challenged law;	**Australia** While proportionality is the predominant doctrine in Australia, this alternate test is applied by a few	Critics of this approach have emphasized that it takes away from the flexibility that is required while considering factually diverse legal challenges. Therefore, the test cannot

[149] ***Libman*** v. ***Quebec (A.G.)***, [1997] 3 S.C.R. 569; ***RJR-MacDonald Inc.*** v. ***Canada (Attorney General)***, [1995] 3 S.C.R. 199; ***Thomson Newspapers Co.*** v. ***Canada (A.G.)***, [1998] 1 S.C.R. 877; ***R.*** v. ***Sharpe***, [2001] 1 S.C.R. 45; ***Harper*** v. ***Canada (A.G.)***, [2004] 1 S.C.R. 827, at paragraph 77; ***R.*** v. ***Bryan***, [2007] 1 S.C.R. 527, at paragraphs 16-19, 29; ***Mounted Police Association of Ontario*** v. ***Canada (Attorney General)***, [2015] 1 S.C.R. 3, at paragraphs 143-144.

[155] Judgment by Gagler J. in ***Clubb*** v. ***Edwards***, (2019) 93 ALJR 448; Also see Adrienne Stone, Proportionality and its Alternatives, Melbourne Legal Studies Research Paper Series No. 848

	⇒ Second, the judge calibrates 'the appropriate level of scrutiny to the risk posed to maintenance of the constitutionally prescribed system of representative and responsible government; ⇒ Third, the judge isolates and assesses the importance of constitutionally permissible purpose of the prohibition; and ⇒ Finally the judge applies the appropriate level of scrutiny so as to determine whether the challenged law is justified as reasonably appropriate and adapted to achieve that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government,	judges. These judges raise concerns about the application of a test of structured proportionality and suggest that it was best understood as 'a tool' of analysis, or 'a means of setting out steps to a conclusion', 'not a constitutional doctrine'.	substitute a contextually guided judicial approach.[156]

[156] See John Braithwaite, Rules and Principles: a Theory of Legal Certainty, Australian Journal of Legal Philosophy 47 (2002).

	The test is similar to some prongs of the proportionality test. However, it is more rule oriented instead of being standard/principle oriented.		
Strict Scrutiny Test	This is considered one of the heightened forms of judicial review that can be used to evaluate the constitutionality of laws, regulations, or other governmental policies under legal challenge.[157] Strict scrutiny is employed in cases of violation of the most fundamental liberties guaranteed to citizens in the United States of America. For instance, it is employed in cases of infringements on free speech. The test places the burden on the government to show a compelling, or strong	**United States of America** The courts in the United States use a tiered approach of review with strict scrutiny, intermediate scrutiny and rational basis existing in decreasing degree of intensity.	Only a limited number of laws survive under the strict scrutiny test. Its application is reserved for instances where the most intensely protected fundamental rights are affected.

[157] See Jennifer L. Greenblatt, Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal, (2009) 10 Fla Coastal L Rev 421.

	interest in the law, and that the law is either very narrowly tailored or is the least speech-restrictive means available to the government. The usual presumption of constitutionality is removed, and the law must also pass the threshold of both – necessity/end and means.		
Unreasonableness / Wednesbury Principles	A standard of unreasonableness is used for the judicial review of a public authority's decision. A reasoning or decision is unreasonable (or irrational) when no person acting reasonably could have arrived at it. This test has two limbs: (i) The court is entitled to investigate the action to check whether the authority has considered and decided on matters which they ought not to have considered, or	***Associated Provincial Picture Houses Ltd*** v. ***Wednesbury Corporation***[158]	The test is simplistic and is traditionally only used for policies/administrative decisions/delegated legislation.

[158] (1948) 1 KB 223.

	conversely, have refused to consider or neglected to consider matters which they ought to have considered. (ii) If the above query is answered in favour of the local authority, it may be held that, although the local authority has ruled on matters which they ought to have considered, the conclusion they have arrived at is nonetheless so unreasonable that no reasonable authority could ever have arrived at it.		

Please note that:-

(i) The above table briefly summarises the different standards of constitutional review and it does not elaborate on the said tests in detail;

(ii) the theories propounded by the jurists are not followed *in toto* across the jurisdictions and this has been pointed out appropriately; and

(iii) the table does not provide an exhaustive account of the full range of standards of review employed internationally and is restricted to the tests identified therein.